No. 89-1715

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CATHY BURNS,
Petitioner,

vs.

RICK REED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

This brief is filed with the Court pursuant to the authority of Rule 37, paragraph 3, of the Rules of the Supreme Court.[1]

The California District Attorneys Association is a non-profit, public service corporation, composed of the State's 58 elected District Attorneys, two elected City Attorneys principally engaged in the prosecution of criminal cases, and about 2,000 deputy prosecutors.

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[1]Written consent of the parties has been obtained and is enclosed as part of the package containing this brief.

The purposes of the California District Attorneys Association are, *inter alia,* to endeavor to improve the administration of criminal justice, to foster and maintain the highest ethical and professional standards of all persons engaged in the prosecution of offenses under California laws, to apply the knowledge and experience of its members in the field of criminal law to the promotion of the public good, and to promote the common welfare of the criminal justice system in areas of mutual concern such as appellate review, training, communication, public education and the equal administration of law.

The organization seeks to make known the views of prosecutors in California, and to bring before this Court their positions on matters affecting the discharge of the duties of prosecutors in their everyday work.

Crime in the United States has grown to such proportions that it is only through vigorous prosecution that our society can function. If a prosecutor cannot obtain evidence or must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibilities and uncertainties of paying legal fees and civil damages, the effectiveness of the criminal justice system may not only be reduced but it is quite possible in many instances that prosecution may not even begin.

The case at bar raises the foregoing issue and is therefore of utmost concern to the prosecutors in California. Amicus curiae believes the opinion of the Court of Appeals for the Seventh Circuit in this case contains a correct statement and application of the law of absolute

prosecutorial immunity, and further believes this brief will assist this court in reaching the correct and just decision on the questions presented.

STATEMENT OF THE CASE

Muncie, Indiana police officers Paul Cox and Donald Scroggins were assigned to investigate a September 2, 1982, incident in which petitioner, Cathy Burns, reported that an unknown assailant entered her home and rendered her unconscious with blows to the head, and then shot her two sons while they slept. The officers' suspicions focused on Burns although in repeated statements Burns denied shooting her sons.

On September 21, 1982, the officers decided to place Burns under hypnosis and she agreed. Officer Cox had received training in hypnosis and recalled there may have been legal restrictions on hypnotizing a suspect. Officer Scroggins made a telephone call to respondent, Chief Deputy Prosecutor for Delaware County Richard Reed, because "we wanted him to give us his opinion on whether we should do that." (R:101) Reed was told Burns wanted to do the hypnosis and that the police had exhausted all leads. Scroggins explained that Burns was a "possible suspect" (R:36-7) and Cox was aware hypnosis of suspects "was questionable at best and that we wanted to ask his opinion if we should proceed or not." (R: 112) Scroggins testified Reed gave "permission" to hypnotize Burns by saying "go ahead." (R:32, 67) Cox testified Reed gave "his approval" by telling Scroggins" if we had no other avenue to explore, we might as well do that." (R:102, 113)

Burns was hypnotized and made statements which the officers believed to be admissions that she indeed had shot her sons. Reed came to the station on September 21, 1982, because a police officer called and said: "That they

needed me at the police station concerning the Cathy [Burns] case. Something had come up, and they needed some advice." (R:126)

According to Officer Cox when Reed arrived at the police station:

> A. The extent of his participation was my explaining to him what we had developed as a result of the hypnotic session and asking if he felt like we had probable cause to make that arrest. . . .
>
> Q. When you asked Mr. Reed of his opinion about probable cause, what was his response?
>
> A. Mr. Reed indicated that we probably had probable cause for the arrest.

(R:107-08, *see also* R:115)

The actual warrantless arrest was performed by Officers Scroggins and Campbell after Scroggins and Cox made the decision to arrest. (R:67-69, 72, 114)

Officer Scroggins testified he did not discuss the decision to arrest Burns with Reed stating: "That's not the policy. We arrest people. The police department arrests people. And the prosecutor's office is the one that actually files the formal charge." (R:69) Officer Cox testified:

> Q. In your conversations with Mr. Reed, had he told you that he didn't think you had probable cause, would you have still arrested her?
>
> A. Probably not.

(R:116)

Cox explained:

> Q. Why did you go to him and request his advice after the hypnotic session was over?

> A. Because he was the deputy prosecuting attorney. I am not an attorney. In situations such as we had there, I wanted to make sure he understood what we had.
>
> Q. You don't need his approval to arrest an individual, do you?
>
> A. Not necessarily, no.
>
> Q. Then why were you going to him?
>
> A. I wanted some help with it.

(R:118)

On September 22, 1982, Officer Scroggins went to the courthouse to get a search warrant for Burns' houses. Reed was told simply to appear in court and assist an officer in getting a search warrant. According to the Honorable Betty Shelton Cole, Judge of the Superior Court, the county prosecutor or one of his deputies has "the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." (R:5)[2] Scroggins and Reed had no time to talk before the probable cause hearing. During the hearing Reed elicited testimony from Officer Scroggins regarding Burns' alleged confession. At no point was Judge Cole told by Scroggins that Burns' confession was in fact his interpretation of Burns' hypnotically induced statements, nor that she had denied involvement in the assaults on numerous other occasions. Reed explained that he thought Scroggins had obtained another confession apart from the hypnosis ses-

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[2]Judge Cole appears to be referring to local practice. Indiana law clearly allows a police officer to personally seek a search warrant without the approval or assistance of the county prosecutor. Indiana Code 35-33-5-1 et seq.

sion. The judge found there was probable cause and issued the search warrant.

On September 28, 1982, Judge Cole issued a warrant for Burns' arrest after an investigator for the Delaware County Prosecuting Attorney submitted an affidavit in support of probable cause which also failed to state that the alleged confession was obtained while Burns was under hypnosis.[3]

Criminal charges against Burns were dismissed after the state court quashed the statements made by Burns while under hypnosis.

Burns then filed a civil rights action for damages under 42 U.S.C. § 1983 in federal district court against the government officials involved in the criminal case, including respondent Reed. The claims against the other defendants were disposed of prior to trial. Burns received a settlement of $250,000. Prior to trial the district court made an in limine ruling apparently granting Reed absolute immunity as to Burns' claims relating to the arrest warrant. (R:14)

Upon the close of Burns' case in chief, Reed moved for a directed verdict pursuant to Federal Rules of Civil Procedure, Rule 50. The trial court entered a directed verdict in favor of Reed finding his activities were protected by absolute immunity.

Burns appealed to the Seventh Circuit Court of Appeals which affirmed the entry of the directed verdict also on the grounds the prosecutor's activities were protected

[3]Under Indiana law a criminal case must be filed in order to obtain an arrest warrant. Indiana code 35-33-2-1(c). California law is in accord. California Penal Code sections 813(a), 814.

by absolute immunity. *Burns v. Reed*, 894 F.2d 949 (7th Cir. 1990).

Burns petitioned this Court for writ of certiorari which was granted on June 28, 1990. See 100 S.Ct. 3269.

SUMMARY OF ARGUMENT

Conflicts among decisions of the lower federal courts regarding the scope of absolute immunity for prosecutors have a chilling effect on the prosecutors' desire to assist law enforcement officers in fulfilling their legal duties while protecting individual constitutional rights. Prosecutors need a bright line demarcation of their immunity under federal law. The appropriate resolution is to grant absolute immunity to all but purely investigative or administrative criminal law functions of prosecutors. In particular, prosecutors should not be held liable for simply giving legal advice to law enforcement officers. Absolute immunity should extend to giving legal advice, including advice as to the existence of probable cause to arrest. Absolute immunity should extend to prosecutors who seek or assist in obtaining search warrants even if this is accomplished by intentionally or recklessly providing false or misleading information to the magistrate.

ARGUMENT
I

CONFLICTS BETWEEN THE CIRCUIT COURTS OF APPEAL AS TO THE SCOPE OF IMMUNITY FOR PROSECUTORS INVOLVED IN PREFILING ACTIVITIES SHOULD BE RESOLVED IN FAVOR OF GRANTING ABSOLUTE IMMUNITY TO ALL BUT PURELY INVESTIGATIVE OR ADMINISTRATIVE PROSECUTORIAL FUNCTIONS.

This Court has recognized two kinds of government official immunity to federal civil suits for damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Most officials are entitled to qualified or good faith immunity, but for officials whose special functions or constitutional status require complete protection from suit the Court has recognized the defense of absolute immunity. *Id.* The Court's analysis has generally followed a "functional" approach to immunity law, recognizing that the judicial, prosecutorial, and legislative functions require absolute immunity. *Forrester v. White*, 484 U.S. 219, 224 (1988); *Harlow*, at 810-11. Absolute immunity does not flow from rank or title or location within the government, but from the nature of the responsibilities of the individual official. *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985).

The societal costs of permitting lawsuits for damages against governmental officials and justifying absolute immunity include the diversion of official energy from pressing public issues, the deterrence of able citizens from acceptance of public office, and fear that being sued may dampen the ardor of all but the most resolute or the most irresponsible in the unflinching discharge of their duties. *Harlow v. Fitzgerald*, 457 U.S. at 814. Additional reasons for according official immunity include the inequity of exposing officials to vicarious liability for the acts

of subordinates, the notion that government servants owe a duty to the public rather than to the individual, and that official accountability is more appropriately enforced through the ballot and in criminal or removal proceedings than in private civil suits. *Gray v. Bell*, 712 F.2d 490, 496-97 (D.C. Cir. 1983); *cert. denied*, 465 U.S. 1100 (1984); *Robichaud v. Ronan*, 351 F.2d 533, 535-36 (9th Cir. 1965).

Absolute immunity is essential to protect the integrity of the judicial process despite any informality with which the judge proceeds and despite any ex parte feature of the proceeding. *Forrester v. White*, 484 U.S. at 227; *Cleavinger v. Saxon*, 474 U.S. at 200. This immunity for judges is absolute even when the judge is accused of acting maliciously and corruptly, and is for the benefit of the public, whose interest it is that judges be free to exercise their functions with independence and without fear of consequences. *Imbler v. Pachtman*, 424 U.S. 409, 418, n.12 (1976).

There are several factors characteristic of the judicial process which are considered in determining whether to extend absolute as opposed to qualified immunity to those involved in the judicial process, including:

1) The need to assure that the individual can perform his function without harassment or intimidation;

2) The presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct;

3) Insulation from political influence;

4) The importance of legal precedent;

5) The adversary nature of the process; and

6) The correctability of error on appeal.

Cleavinger v. Saxon, 474 U.S. at 202, citing *Butz v. Economou*, 438 U.S. 478, 512 (1978).

At common-law the absolute immunity extended to judges and grand jurors was also extended to prosecutors in what is known as quasi-judicial immunity. *Imbler v. Pachtman*, 424 U.S. at 422-23 and n.20. In *Imbler* this Court determined that the same considerations of public policy that underlie the common-law rule also countenance absolute immunity for prosecutors from civil rights suits under 42 U.S.C. § 1983. *Id.*, 424 U.S. at 424. The Court cited some of these public policy considerations such as:

1) Loss of public trust in the prosecutor's office if every decision was constrained by fear of potential civil liability for damages;

2) Likelihood disgruntled defendants would use such suits for revenge or retaliation;

3) Diversion of the prosecutor's energy and attention from the pressing duty of enforcing the criminal law;

4) Complexity of the legal issues regarding liability would often require a virtual retrial of the criminal offense in the civil forum by lay jurors without technical expertise;

5) The intolerable burden of requiring a prosecutor to defend, often years later, actions necessarily taken under serious constraints of time and information; and

6) Reluctant prosecutors might not file close cases or those with sharp conflicts of evidence rather than take an appropriate stance of permitting a jury to resolve the conflict.

Id. at 424-26. The Court noted numerous safeguards are already in place to deter or remedy prosecutorial misconduct, including scrutiny of filed cases by trial and appellate judges, criminal liability, and professional discipline by an association of peers. *Id.* at 427-29. Another safeguard is that the prosecutor's superiors or appointing authority can remove the prosecutor for abuse of position. *Henderson v. Lopez*, 790 F.2d 44, 47 (7th Cir. 1986); *see generally Morrison v. City of Baton Rouge*, 761 F.2d 242, 246, n.3 (5th Cir. 1985).

The decision in *Imbler* was limited to the quasi-judicial prosecutorial functions of initiating a prosecution and in presenting the State's case. 424 U.S. at 430-31. The Court stated: "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* The Court explained further in footnote:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required, constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as

> an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id. at 431, n.33.

Even before *Imbler* some courts of appeal had refused to extend absolute immunity to prosecutorial investigative conduct anticipating the distinction drawn in *Imbler*. See *Robichaud v. Ronan,* 351 F.2d at 536-37. After *Imbler* the courts of appeal generally ruled prosecutors do not enjoy absolute immunity for acts taken in administrative or investigative roles. *Harlow v. Fitzgerald,* 457 U.S. at 811, n.16. The Court has acknowledged it has implicitly drawn the same distinction in *Butz v. Economou,* 438 U.S. at 515-17. *Id.* However, the courts of appeal have indeed found it difficult to apply the functional test in determining whether specific prosecutorial activities are quasi-judicial enjoying absolute immunity. *Imbler v. Pachtman,* 429 U.S. at 431, n.33; *Gray v. Bell,* 712 F.2d 490, 499. Cases describe the "gray area" between quasi-judicial, investigative and administrative functions relating to the initiation of a prosecution. *Joseph v. Patterson,* 795 F.2d 549, 554 (6th Cir. 1986), *cert. denied,* 481 U.S. 1023 (1987); *Forsyth v. Kleindienst,* 599 F.2d 1203, 1215 (3rd Cir. 1979), *cert. denied,* 453 U.S. 913 (1981). The dilemma was pinpointed in *Marx v. Gumbinner,* 855 F.2d 783 (11th Cir. 1988) in which the Court of Appeals for the Eleventh Circuit noted the goal is to determine absolute immunity as early as possible, yet the dividing line for prosecutors remains "amorphous, and the process of determining on which side of the line particular kinds of conduct fall has proceeded on a case-by-case basis." At 788-89.

Only the vaguest of tests have been devised. For instance, the Court of Appeals for the District of Columbia in *Gray v. Bell,* 712 F.2d 490 set forth two general

categories of factors to take into consideration. First, the court considered whether the prosecutor's conduct was "sufficiently adversarial" to justify absolute immunity. *Gray,* 712 F.2d at 500. The court in *Joseph v. Patterson,* 795 F.2d at 554 used the term "advocatory" as a synonym for "quasi-judicial." Among the factors considered here by the court in *Gray* were the particularity of the proceeding "in terms of focusing on a specific target, the "context of the conduct" in terms of formality, and the "nature of particular prosecutorial actions or decisions" in relationship to "traditional quasi-judicial functions." 712 F.2d at 500-01. The second category of factors are the safeguards available to "minimize the necessity for civil damage suits." *Id.* at 501. Here mentioned was the level of judicial scrutiny, availability of trial sanctions and professional discipline. *Id.*

The circuit courts of appeal decisions attempting to draw the cutoff line of absolute immunity for the prosecutor's varied prefiling activities are mixed and sometimes contradictory. A good compilation of case decisions can be found in *Myers v. Morris,* 810 F.2d 1437, 1446-47 (8th Cir. 1987), *cert. denied,* 484 U.S. 823 (1987). Some examples are cited below.

Cases have not extended absolute immunity to prosecutors who participate in the execution of a warrantless search. *Fullman v. Graddick,* 739 F.2d 553, 559 (11th Cir. 1984). There is no absolute immunity for investigative wiretaps, unless the wiretap is for "securing of information . . . necessary to a prosecutor's decision to initiate a criminal prosecution." *Forsyth v. Kleindienst,* 599 F.2d at 1215; *cf. Jacobson v. Rose,* 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied,* 442 U.S. 930 (1979).

A prosecutor does not have absolute immunity when entrapping a suspect. *Mullinax v. McElhenney,* 817 F.2d

711, 715 (11th Cir. 1987). However, the prosecutor is immune when threatening criminal prosecution, *Goldschmidt v. Patchett*, 686 F.2d 582, 585 (7th Cir. 1982), or conspiring to prosecute for a crime that never occurred. *Rachuy v. Murphy Motor Freight Lines, Inc.*, 663 F.2d 57, 58 (8th Cir. 1981).

Absolute immunity has been denied for prosecutorial activities such as interviewing crime victims and witnesses as part of the initial investigation. *Robison v. Via*, 821 F.2d 913, 920 (2nd Cir. 1987) (No absolute immunity for child abuse investigation). However, absolute immunity is extended to prosecutor who questions child abuse victims as part of their prosecutorial responsibility to decide who to charge and how to present the case. *Myers v. Morris*, 810 F.2d at 1448-51. Absolute immunity also applies to a prosecutor who confers with witnesses allegedly to induce perjurious testimony. *Rose v. Bartle*, 871 F.2d 331, 343-45 (3rd Cir. 1989) (Before grand jury); *Demery v. Kupperman*, 735 F.2d 1139, 1143-44 (9th Cir. 1984) (Before professional disciplinary hearing), *cert. denied*, 469 U.S. 1127 (1985).

The conflict of philosophies in the cases interpreting *Imbler* is evident. In *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), the Court of Appeals for the Fifth Circuit stated "a prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities." *Id.* at 505. The Court of Appeals for the Ninth Circuit has held, however, "that absolute prosecutorial immunity attaches to the actions of a prosecutor if those actions were performed as part of the prosecutor's preparation of his case, even if

they can be characterized as 'investigative' or 'administrative.'" *Demery v. Kupperman*, 735 F.2d at 1143.

Some of these conflicts are ripe for decision in the instant case. Amicus curiae, the California District Attorneys Association, urges the Court to grant absolute immunity to prosecutors to the fullest extent possible consistent with the principles and policies set forth in the Court's prior decisions such as *Imbler v. Pachtman*. The appropriate dividing line is to grant absolute immunity to all prosecutorial activities regarding criminal cases, including those functions occurring prior to initiating formal proceeding, which are not purely investigative or administrative.

II

PROSECUTORS ARE ENTITLED TO ABSOLUTE IMMUNITY WHEN GIVING LEGAL ADVICE TO INVESTIGATING POLICE AGENCIES.

The court of appeals in this case ruled "that a prosecutor is absolutely immune from suit when acting as a legal advisor to police officers." *Burns v. Reed*, 894 F.2d 949, 955 (7th Cir. 1990). However, absolute immunity ends if the prosecutor "actually participates in investigative conduct." *Id.* at 956. The court of appeals acknowledged that as to the former rule there was a conflict of opinion among the circuits. *Id.* at 955 and n.5.

One distinction flows from the relationship between the prosecuting agency and the policy agency. For instance, the United States Attorney General has statutory duties far greater than those of the ordinary prosecutor, including supervising the Federal Bureau of Investigation. 28 U.S.C. § 531; *Forsyth v. Kleindienst*, 599 F.2d at 1212 and n.10. As this Court has pointed out, it makes little sense

to hold the subordinate agent liable for illegal conduct but afford immunity to the official of a higher rank who orders the action. *Butz v. Economou*, 438 U.S. at 506. However, this reasoning should not apply when the prosecuting agency has no direct control or supervisory powers over the investigating agency.

The Seventh Circuit's approach is correct. When the prosecutor's only relationship to the police is that of legal advisor the prosecutor is absolutely immune when so advising a police officer. *Burns v. Reed*, 894 F.2d at 955; *Henderson v. Lopez*, 790 F.2d at 47. There are substantial similarities between the traditional prosecutorial function of initiating and handling criminal cases and giving legal advice to police officers regarding potential criminal cases. *Henderson*, 790 F.2d at 47. Thus giving legal advice is properly characterized as a quasi-judicial function. *Id.*

The Tenth Circuit has granted only qualified immunity to prosecutors who offer legal advice to law enforcement agencies. *Wolfenbarger v. Williams*, 826 F.2d 930, 937 (10th Cir. 1987); *Benavidez v. Gunnell*, 722 F.2d 615, 616-617 (10th Cir. 1983). However, the issue is scarcely discussed in *Benavidez* as the Court ultimately dismissed the plaintiff's case on the basis of qualified immunity. 722 F.2d at 618. *Wolfenbarger* merely followed *Benavidez* on the basis of stare decisis. 826 F.2d at 937. Neither case offers the same depth of reasoning as the Seventh Circuit cases.

Ironically the Tenth Circuit's approach puts virtually the entire burden of liability on the prosecutor who offers legal advice to the police officer. The Tenth Circuit holds that where the law is unclear the police officer is immune if the officer consulted with and relied upon the advice of a prosecuting attorney. *England v. Hendricks*, 880 F.2d 281, 284 (10th Cir. 1989), *cert. denied*, 110 S.Ct. 1130

(1990); *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). At the same time the Tenth Circuit is encouraging police to seek advice in close cases, it is discouraging prosecuting attorneys from giving such advice. Absolute immunity for prosecutors will encourage police officers to seek advice before they act. The greatest protection against constitutional rights violations is prevention, not after the fact civil suits for damages.

As outlined in *Burns v. Reed* and *Henderson v. Lopez* there is strong justification for characterizing the prosecutor's function of giving legal advice to law enforcement officers as quasi-judicial and thus entitled to absolute immunity.

First, the prosecutor relies on representations about the facts from the police officer when giving advice just as he does when deciding whether to accept or reject a case for prosecution. The prosecutor seldom has the time or resources to check the accuracy or completeness of the information upon which his legal decision rests. By its very nature the giving of legal advice cannot be defined as an investigative function.

Second, the prosecutor is giving a legal opinion based on his training and experience in the law. When advising the police as to legality of their proposed conduct the prosecutor is making the same sort of legal decision prosecutors make every day when functioning as the initiator and advocate of a State's case against an individual.

The police seek out the prosecutor for advice instead of general counsel for their governmental entity (i.e., the city attorney or county counsel) because the prosecutor works in the criminal courts daily and generally has a

better grasp of the legal rules governing the criminal justice system. Also the prosecutor's office, if not that same prosecutor, is often the one who will make the determination whether the police officer followed the law and has presented a viable case for filing.

Even when not required by law, prosecutors often freely offer legal advice to police officers who ask for it. The motivation of the prosecution is not to be part of the investigation or arrest, but to make sure that the police do not take actions which jeopardize the chances of successfully prosecuting any resulting criminal case. Thus the prosecutor is willing to offer advice because of its direct relationship to his quasi-judicial function of determining which cases to prosecute and his quasi-judicial function of "obtaining, reviewing and evaluating" evidence before trial. *Imbler*, 424 U.S. at 432, n.34.

Third, a police officer's questions about the legality of his proposed conduct are the same type of issues faced by judges and lawyers in their everyday week. That the prosecutor renders the advice outside court and prior to the filing of a case should not be fatal to a grant of absolute immunity. Nor should the fact that the prosecutor shares the desire of the police to enforce the criminal laws to the fullest extent within the limitations of the constitution. The prosecutor's advice is most often sought in close cases. The public interest must be to have a prosecutor who will make the close call impartially and undeterred by threat of vexatious litigation. The public interest in solving crimes and prosecuting criminal cases with the strongest caliber of evidence necessitates that police sometimes act in the gray areas between constitutional rights. Without absolute immunity prosecutors may well choose not to lend advice to an officer who has enough sense to seek such advice.

Instead law enforcement would be faced with several much less satisfactory alternatives. The officer might hesitate to take even legal action and by doing so lose valuable evidence. The officer might simply act out of ignorance and endanger individual constitutional rights needlessly. If available the officer might seek legal advice from other county legal officials whose primary job is to prevent and defend civil lawsuits. Insuring the availability of expert legal advice from those intimately familiar with criminal law and procedure is one of the main reasons for granting absolute immunity to prosecutors. One other alternative is the costly prospect of police agencies, big and small, having to hire their own lawyers and legal advisors despite the existence of otherwise readily accessible and knowledgeable public prosecutors.

Another decision of concern to amicus is *Marrero v. City of Hialeah*, 625 F.2d 499. The Fifth Circuit Court of Appeals in *Marrero* indicated it was not considering "the degree of immunity to which a prosecutor would be entitled if he merely gave legal advice from his office in response to specific inquiries from police officers." *Id.* at 505-506, n.8. The prosecutor in *Marrero* merely accompanied police on the execution of a search warrant and apparently "conferred" with police during the search. There was no allegation that the prosecutor participated in or had any supervisory authority over the search warrant execution. The court granted only qualified immunity. *Id.* at 510. *Marrero* seems to characterize the prosecutor as participating in the investigation simply because he gave legal advice to the police at the scene rather than on the telephone or from the prosecutor's office. There is no justification for such distinction. This arbitrary distinction ignores the modern trend of prosecutors working more closely with law enforcement to make sure the end product of the investigative effort is a solid

criminal prosecution. Rather than offering legal advice behind a desk on matters of immediate police concern some prosecuting agencies, like the San Diego County District Attorney's Office, have created separate divisions of lawyers specializing in particular areas, such as gangs or narcotics, who often go to crime scenes and are available to offer advice to police 24 hours a day. The advantages of this greater level of cooperation are many, but key to the issue at hand is that it is far more likely that the constitutional rights of individuals will be protected rather than abused when the prosecutor is available and willing to lend advice.

There is an entirely different approach to the issue of liability when a prosecutor lacking supervisory authority over the police merely gives legal advice to an officer. Since the officer is merely seeking guidance and is free to accept or reject the advice given there is insufficient causal connection under 42 U.S.C. § 1983 to hold the prosecutor liable. Regardless of the Court's ruling on the issue of immunity, the Court should hold that as a matter of law the proximate cause element of 42 U.S.C. § 1983 requires more than merely giving advice to the public official who acts illegally.

A section 1983 cause of action is premised on the requirement that the governmental official's actions "subjects, or causes to be subjected" a citizen to contitutional deprivation. Thus, causation is an essential element of a section 1983 cause of action. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986); *Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355-56 (9th Cir. 1981). The plaintiff must establish proximate or legal causation. *Arnold*, 637 F.2d at 1355. In order to maintain a section 1983 action the "plaintiff must specifically allege a *direct* causal link between some official conduct . . . and the alleged constitutional deprivations." *Fialkowski v. Shapp*, 405 F. Supp. 946, 950 (D.C. Pa. 1975) emphasis added; *see also Prochaska v. Fediaczko*, 473 F. Supp. 704, 708 (D.C. Pa. 1979). Lacking personal participation the official is not liable under section 1983. *Prochaska*, 473 F. Supp. at 707; *Kreutzer v. County of San Diego*, 153 Cal.App.3d 62, 70-71, 200 Cal.Rptr. 322 (1984). Allegations of mere encouragement of unconstitutional action are insufficient. *Durkin v. Bristol Tp.*, 88 F.R.D. 613, 615 (D.C. Pa. 1980).

This Court has held that a governmental agency cannot be found liable under section 1983 for acts of individual employees unless the injury is inflicted pursuant to an official governmental policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-94 (1978). The Court stated: "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." *Id.* at 692.

Monell was applied to the county prosecutor's office by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In *Pembaur* the Sheriff's Department requested legal assistance from the county prosecutor not just in the form of legal advice, but under a particular Ohio statutory scheme which in effect delegated the final decisionmaking authority to the prosecutor. Therefore, the Court held the prosecutor's advice established county policy under *Monell* subjecting the county prosecutor to liability under section 1983. *Id.* at 485. However, the Court indicated it "might be inclined to agree" that no liability attached to the county prosecutor if the individual prosecutors merely rendered "legal advice." *Id.* at 484. *Pembaur* did not

involve the liability or immunity of the individual prosecutor. *Id.* at 474, n.2.

Applying these principles to the case at hand it is clear respondent Reed had no supervisory or policymaking authority over the conduct of the Muncie Police Department. As county prosecutor his only function was to provide legal advice to the local law enforcement agency. Based on a short synopsis of the situation by Officer Scroggins, Reed gave his legal opinion as to propriety of hypnotizing appellant Burns. While the officers characterized Reed's actions as giving "approval" or "permission," the underlying facts clearly show that the decision rested not with Reed but with the police. The fact Reed gave his legal opinion from home after working hours rather than from his office should not strip him of absolute immunity. The trial and appellate courts below properly granted absolute immunity to respondent.

In addition, there is insufficient evidence that respondent's act of giving legal advice was the direct cause of the alleged impropriety. Reed did not personally participate in the hypnosis or related investigatory actions of the police. Lacking personal participation or supervisory responsibility over the police, Reed should not be held liable under section 1983.

III

PROSECUTORS SHOULD BE AFFORDED ABSOLUTE IMMUNITY WHEN GIVING LEGAL ADVICE TO LAW ENFORCEMENT OFFICERS AS TO THE EXISTENCE OF PROBABLE CAUSE TO ARREST.

A separate but closely related issue to that of whether prosecutors should have absolute immunity when giving

legal advice is whether prosecutors should have absolute immunity when giving legal advice as to the existence of probable cause to arrest. Regardless of the Court's conclusion as to the former issue, the latter issue discussed here presents an even stronger justification for absolute immunity.

In addition to the Seventh Circuit cases extending quasi-judicial immunity to prosecutors giving legal advice generally, other circuits considering the question of legal advice regarding probable cause to arrest have granted absolute immunity. In *Myers v. Morris*, 810 F.2d 1437, the prosecutor opined that based on the facts related to her there was probable cause to arrest and charge. The Court of Appeals for the Eighth Circuit concluded the prosecutor had absolute immunity when performing this function. *Id.* at 1448. "We hold that in providing advice to law enforcement officials concerning the existence of probable cause and the prospective legality of arrests, Morris was functioning in a quasi-judicial capacity as a prosecutor initiating the formal judicial process." *Id.*

The Eleventh Circuit in *Marx v. Gumbinner* declined to rule on extending absolute immunity to legal advice in general. 855 F.2d at 790, n.13. However, the circuit court did "hold that absolute immunity adheres where, as here, the act complained of is that of rendering legal advice to police officers concerning the existence of probable cause to make an arrest." *Id.* at 790.

The basic rationale of these opinions is that the decision whether probable cause exists is a key part of the prosecutor's quasi-judicial function of initiating a prosecution to which absolute immunity clearly adheres. *Marx*, 855 F.2d at 790; *Myers*, 810 F.2d at 1448. Not only does absolute immunity attach to the decision to initiate prosecution, it attaches to the decision not to initiate prosecu-

tion. *Barrett v. United States*, 798 F.2d 565, 572 (2nd Cir. 1986); *Morrison v. City of Baton Rouge*, 761 F.2d at 248. Therefore, the prosecutor should be absolutely immune for any advice he gives to law enforcement on the question of probable cause to arrest or the related legalities of an arrest.

Turning to the present case it is clear that respondent Reed did not personally participate in the arrest of appellant Burns. Reed was asked his opinion by the police who were free to accept or reject the advice. As Officer Scroggins, who actually made the arrest, succinctly explained, "The police department arrests people. And the prosecutor's office is the one that actually files the formal charges." (R:69) As Officer Cox stated, the police did not need Reed's approval to arrest. (R:118) It is irrelevant that under Indiana law a prosecutor has the same power to arrest as any law enforcement officer (Indiana 35-31-1-1 and 35-41-1-17) because Reed did not make the arrest in this case.

From respondent Reed's position as prosecutor he was simply making a legal decision whether, based on the facts as described by the officers, there was probable cause to arrest. This decision was inextricably tied to his role as prosecutor to determine whether there was sufficient evidence to initiate a criminal filing. When functioning as the gatekeeper over which cases will be prosecuted in the criminal courts, a prosecutor, such as respondent in this situation, is fulfilling a quasi-judicial role for which absolute immunity clearly adheres. *Imbler*, 424 U.S. at 431. The trial and appellate courts properly granted absolute immunity to respondent when he advised the police as to the existence of probable cause to arrest appellant Burns.

IV

PROSECUTORS SHOULD BE AFFORDED ABSOLUTE IMMUNITY WHEN SEEKING A SEARCH WARRANT.

This case presents the issue whether a prosecutor should be granted absolute immunity when seeking or assisting a police officer who applies for a search warrant even if the application is based on intentionally or recklessly false or misleading information. The Court has indicated a judge or magistrate is protected by absolute immunity when issuing search warrants. *Stump v. Sparkman*, 435 U.S. 349, 363, n.12 (1978). A prosecutor who advocates for issuance of such a warrant should also be granted absolute immunity.

The circuit courts have drawn a distinction between whether the search warrant is sought for purely investigative purposes or whether it is part of the prosecutor's attempt to gather evidence in order to make an informal judgment whether to initiate a prosecution. *Joseph v. Patterson*, 795 F.2d at 556; *see also Rex v. Teeples*, 753 F.2d 840, 845-46 (10th Cir. 1984) (dissent of Justice Barrett), *cert. denied*, 474 U.S. 967 (1985). In *Joseph* the plaintiffs alleged the prosecutors obtained a search warrant for evidence relating to criminal charges filed by a citizen which the prosecutors knew were false. The Sixth Circuit Court of Appeals found this conduct fell in the "gray" area of immunity analysis because it displayed characteristics of both advocatory and investigatory functions. 795 F.2d at 556. The court remanded the case for further factual inquiry, but noted: "Clearly, decisions of when and how to prosecute are not made in a vacuum, so that in some cases the directing of police to secure further evidence may be necessary to and part of a decision to prosecute." *Id.* If done as part of the decision whether or

not to prosecute a case, the obtaining of a search warrant becomes a quasi-judicial function and the prosecutor is entitled to absolute immunity. *Id.*

A similar ruling was made in *Liffiton v. Keuker*, 850 F.2d 73 (2nd Cir. 1988), involving a wiretap warrant. The court remanded for further factual inquiry as to whether the applications for the wiretap warrants, allegedly based on false affidavits, were purely investigative or prosecutorial in nature. *Id.* at 77. (*Dist. Jacobson v. Rose*, 592 F.2d 515, 524 — warrant authorized wiretapping by the District Attorney's Office.)

In contrast, in *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982), *cert. denied*, 474 U.S. 1005 (1985), the court determined there should be no absolute immunity for a prosecutor who prepares an arrest or search warrant flagrantly lacking probable cause. *Id.* at 319. The court stated:

> Similarly, preparation of the arrest and search warrants and participation in the search and seizure are nonadvocative. They involve not the protected decision to initiate prosecution, but rather the earlier, preliminary gathering of evidence which may blossom into a potential prosecution. The latter is investigatory activity and therefore receives only qualified immunity.

Id. at 320.

However, in *Gray v. Bell*, 712 F.2d 490, the District of Columbia Circuit Court of Appeals appears to have expanded its view of evidence gathering as quasi-judicial, absolutely protected activity. In *Gray* the court held that a prosecutor's investigatory actions in preparation for grand jury proceedings which had "focused on a particular suspect or crime" were entitled to absolute immunity. *Id.* at 503-04.

In the State of California a search warrant can be obtained for a number of reasons not all of which necessarily contemplate a criminal prosecution. California Penal Code section 1424. Thus the distinction drawn between search warrants obtained for purely investigative purposes and those sought to assist the prosecutor in "obtaining, reviewing and evaluating" evidence in preparation for initiating a criminal case is valid. The prosecutor is entitled to absolute immunity as to the latter function. *Imbler*, at 431, n.33.

However, as illustrated by the present case, a further distinction needs to be drawn based on the nature of the prosecutor's participation in obtaining the search warrant. It is generally law enforcement agents who initiate the request for a search warrant. It is the officer who generally takes the oath before testifying or signs the affidavit under penalty of perjury before presenting it to the magistrate. The officer goes to the prosecutor for legal advice and assistance as to the factual and technical sufficiency of the warrant application. As discussed previously, the act of giving such legal advice should not subject the prosecutor to liability under section 1983. The prosecutor may go further and help present the affidavit or testimony of the police officer to the magistrate. Although done ex parte and informally this is clearly an in-court advocacy function for which the prosecutor should be granted quasi-judicial immunity. It is only when the prosecutor assumes the role of affiant or witness that he steps out of the prosecutorial role.

In the instant case petitioner's factual record was complete. It shows that the search warrant was obtained after petitioner was arrested and the determination

whether to initiate prosecution was imminent. The warrant was not sought for purely investigative purposes, but focused on a particular crime and a particular suspect as well as particular items of evidence for use during the prosecution. Thus respondent Reed is entitled to the protection of absolute immunity for his participation in obtaining the search warrant for petitioner's home.

In addition, respondent Reed should be granted absolute immunity because his participation in obtaining the search warrant was limited to questioning Officer Scroggins under oath before Judge Cole. This mirrored the traditional prosecution function of presenting witnesses and advocating legal matters before a court to which quasi-judicial immunity clearly applies. Impliedly conceding the weakness of her position petitioner attempts to characterize respondent Reed's leading form of questioning Officer Scroggins as Reed actually testifying. (Brief of Petitioner, at 22.) It was Officer Scroggins' answers under oath which the judge relied on to issue the warrant. Officer Scroggins was specifically asked by respondent Reed: "Is there anything else you'd like to tell the Judge about that?" and Scroggins answered "no." (Petition for Certiorari, Appendix C, 21a.) It was clearly Scroggins who misled the judge. There can be no legitimate question here that respondent Reed maintained his role as prosecutor and advocate during the probable cause hearing for the search warrant. Reed is entitled to quasi-judicial immunity when performing this function.

Appellant confuses the requirement that an Indiana prosecutor seek or approve any search warrant (R:5) with the lack of such requirement when an arrest warrant is presented (R:15-16). (Brief of Petitioner, at 5.) Under the "uniquely prosecutorial function" test proposed in the Amicus Brief by the American Civil Liberties Union

respondent Reed is entitled to absolute immunity because Judge Cole's trial testimony is clear that the Indiana county prosecutor's office has "the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." (R:5)[4] In any event the ACLU test ignores the previously described benefits of encouraging police and prosecutor consultation before the police act. In their zeal to find someone to sue after an alleged violation, the ACLU position in practice would increase the risk of unconstitutional police conduct. The Court is urged to reject the ACLU position.

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[4]But see footnote 2, *supra*.

CONCLUSION

Based on the foregoing arguments and authorities, amicus, the California District Attorneys Association, respectfully requests that this Court extend the protection of absolute immunity to public prosecutors engaged in prefiling activities relating to the initiation of criminal prosecutions by affirming the decisions of the trial and lower appellate courts in this case.

Dated:

Respectfully submitted,

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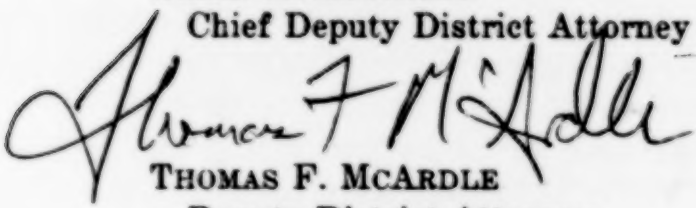

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APPENDIX OF STATUTORY PROVISIONS

California Penal Code section 813 states in part:

> (a) When a complaint is filed with the magistrate charging a public offense originally triable in the superior court of the county in which he or she sits, if the magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, the magistrate shall issue a warrant for the arrest of the defendant, except that, upon the request of the prosecutor, a summons instead of an arrest warrant shall be issued; provided, that a judge of the justice court who is not a member of the State Bar may issue such a warrant or summons only upon the concurrence of the district attorney of the county in which he or she sits or the Attorney General.

California Penal Code section 814 states:

> A warrant of arrest issued under Section 813 may be in substantially the following form:
>
> County of _____
>
> The people of the State of California to any peace officer of said State:
>
> Complaint on oath having this day been laid before me that the crime of _____ (designating it generally) has been committed and accusing _____ (naming defendant) thereof, you are therefore commanded forthwith to arrest the above named defendant and bring him before me at _____ (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at _____ (place) this _____ day of _____, 19__.

_____

(Signature and full official title of magistrate.)

California Penal Code section 1424 states in part:

(a) A search warrant may be issued upon any of the following grounds:

(1) When the property was stolen or embezzled.

(2) When the property or things were used as the means of committing a felony.

(3) When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he or she may have delivered it for the purpose of concealing it or preventing its being discovered.

(4) When the property or things to be seized consist of any item or constitutes any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

(5) When the property or things to be seized consist of evidence which tends to show that sexual exploitation of a child, in violation of Section 311.3, has occurred or is occurring.

Indiana Code 35-33-2-1 states:

Sec. 1. (a) Except as provided in chapter 4 of this article, whenever an indictment is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court, without

making a determination of probable cause, shall issue a warrant for the arrest of the defendant.

(b) Whenever an information is filed and the defendant has not been arrested or otherwise brought within the custody of the court, the court shall issue a warrant for the arrest of the defendant after first determining that probable cause exists for the arrest.

(c) No warrant for arrest of a person may be issued until:

(1) an indictment has been found charging him with the commission of an offense; or

(2) a judge has determined that probable cause exists that the person committed a crime and an information has been filed charging him with a crime.

Indiana Code 35-33-5-1 states:

Sec. 1. (a) A court may issue warrants only upon probable cause, supported by oath or affirmation, to search any place for any of the following:

(1) Property which is obtained unlawfully.

(2) Property, the possession of which is unlawful.

(3) Property used or possessed with intent to be used as the means of committing an offense or concealed to prevent an offense from being discovered.

(4) Property constituting evidence of an offense or tending to show that a particular person committed an offense.

(5) Any person.

(6) Evidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children.

(b) As used in this section, 'place' includes any location where property might be secreted or hidden, including buildings, persons, or vehicles.

Indiana Code 35-33-5-2 states:

Sec. 2. (a) Except as provided in section 8 of this chapter, no warrant for search or arrest shall be issued until there is filed with the judge an affidavit, particularly describing the house or place to be searched and the things to be searched for, or particularly describing the person to be arrested, and alleging substantially the offense in relation thereto, and that the affiant believes and has good cause to believe that such things as are to be searched for are there concealed, or that the person to be arrested committed the offense, and setting forth the facts then in knowledge of the affiant or information based on hearsay, constituting the probable cause. When based on hearsay, the affidavit must either:

(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

(2) contain information that establishes that the totality of the circumstances corroborates the hearsay.

(3) An affidavit for search substantially in the following form shall be deemed sufficient:

STATE OF INDIANA
COUNTY OF } ss.:

AB swears (or affirms, as the case may be) that he believes and has good cause to believe (here set forth the facts and information constituting the probable cause) that (here describe the things to be searched for and the offense in relation thereto) are concealed in or about the (here describe the house or place) of CD, situated in the county of in said state.

Subscribed and sworn to before me this day of 19 .

Indiana Code 35-33-5-8 states:

Sec. 8. (a) A judge may issue a search or arrest warrant without the affidavit required under section 2 of this chapter, if the judge receives sworn testimony of the same facts required for an affidavit:

(1) in a nonadversarial, recorded hearing before the judge;

(2) orally by telephone or radio; or

(3) in writing by facsimile transmission (FAX).

(b) After receiving the facts required for an affidavit and verifying the facts recited under penalty of perjury, an applicant for a warrant under subsection (a)(2) shall read to the judge from a warrant form on which the applicant enters the information read by the applicant to the judge. The judge may direct the applicant to modify the warrant. If the judge agrees to issue the warrant, the judge shall direct the

applicant to sign the judge's name to the warrant, adding the time of the issuance of the warrant.

(c) After transmitting an affidavit, an applicant for a warrant under subsection (a)(3) shall transmit to the judge a copy of a warrant form completed by the applicant. The judge may modify the transmitted warrant. If the judge agrees to issue the warrant, the judge shall transmit to the applicant a duplicate of the warrant. The judge shall then sign the warrant retained by the judge, adding the time of the issuance of the warrant.

(d) If a warrant is issued under subsection (a)(2), the judge shall record the conversation on audio tape and order the court reporter to type or transcribe the recording for entry in the record. The judge shall certify the audio tape, the transcription, and the warrant retained by the judge for entry in the record.

(e) If a warrant is issued under section (1)(3), the judge shall order the court reporter to the retype or copy the facsimile transmission for entry in the record. The judge shall certify the transcription or copy and warrant retained by the judge for entry in the record.

(f) The court reporter shall notify the applicant who received a warrant under subsection (a)(2) or (a)(3) when the transcription or copy required under this section is entered in the record. The applicant shall sign the typed, transcribed, or copied entry upon receiving notice from the court reporter. *As added by P.L.161-1990, SEC.2.*